

STATUTE

SECTION 92 of Chapter 149 of the Acts of 2004 amended the General Laws by inserting after chapter 40Q the following chapter:

CHAPTER 40R. SMART GROWTH ZONING AND HOUSING PRODUCTION

Section 1. It is the purpose of this chapter to encourage smart growth and increased housing production in Massachusetts. Smart growth is a principle of land development that emphasizes mixing land uses, increases the availability of affordable housing by creating a range of housing opportunities in neighborhoods, takes advantage of compact design, fosters distinctive and attractive communities, preserves open space, farmland, natural beauty and critical environmental areas, strengthens existing communities, provides a variety of transportation choices, makes development decisions predictable, fair and cost effective and encourages community and stakeholder collaboration in development decisions.

Section 2. As used in this chapter, the following words shall have the following meanings:

"Affordable housing", housing affordable to and occupied by individuals and families whose annual income is less than 80 per cent of the areawide median income as determined by the United States Department of Housing and Urban Development. Affordability shall be assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184.

"Approved smart growth zoning district", a smart growth zoning district that has been adopted by a city or town and approved by the department in accordance with this chapter and the regulations of the department, so as to be eligible for the receipt of financial and other incentives. The department may revoke its approval if the obligations of the city or town are not met.

"Approving authority", a unit of municipal government designated by the city or town to review projects and issue approvals under section 11.

"Comprehensive housing plan", a plan to be prepared by each city or town that provides an assessment of the housing needs within a city or town and describes specific strategies to address these needs, in accordance with regulations of the department.

"Density bonus payment", a one-time payment to a municipality from the trust fund established in section 35BB of chapter 10 for each housing unit of new construction that is created in a smart growth zoning district.

"Department", the department of housing and community development.

"Developable land area", that area within an approved smart growth zoning district that can be feasibly developed into residential or mixed use development determined in accordance with regulations of the department. Developable land area shall not include: (1) land area that is already substantially developed, including existing parks and dedicated, perpetual open space within such substantially developed portion; (2) open space designated by the city or town as provided in section 6; or (3) areas exceeding 1/2 acre of contiguous land that are unsuitable for development because of topographic features or for environmental reasons, such as wetlands.

It shall include the land area occupied by or associated with underutilized residential, commercial, industrial or institutional buildings or uses that have the potential to be recycled or converted into residential or mixed use developments as determined in accordance with regulations of the department.

"Eligible locations", (1) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals; (2) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts; or (3) areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential or mixed use smart growth zoning districts.

"Historic district", a district in a city or town characterized by the unique historic quality of the buildings within the district, and in which exterior changes to all buildings and the construction of new buildings are subject to special architectural and design guidelines as voted by the city or town pursuant to state law.

"Letter of eligibility", a letter to a city or town to be issued by the department within 60 days of receiving a complete and approvable application from a city or town for approval of a smart growth zoning district.

"Mixed use development", a development containing a mix of some or all of multi-family residential, single-family residential, commercial, institutional, industrial and other uses, all conceived, planned and integrated to create vibrant, workable, livable and attractive neighborhoods.

"Multi-family housing", apartment or condominium units in buildings which contain or will contain more than 3 such units.

"New construction", construction of new housing units, the substantial rehabilitation of existing buildings or the conversion to residential use of existing buildings to create additional housing units, to the extent those units could not have been constructed or converted under the underlying zoning.

"Open space", shall include, but not be limited to, land to protect existing and future well fields, aquifers, and recharge areas, watershed land, agricultural land, grasslands, fields, forest land, fresh and salt water marshes and other wetlands, ocean,

river, stream, lake and pond frontage, beaches, dunes, and other coastal lands, lands to protect scenic vistas, land for wildlife or nature preserve and land for recreational use.

"Project", a proposed residential or mixed-use development within a smart growth zoning district.

"Smart growth zoning district", a zoning district adopted by a city or town under this chapter that is superimposed over 1 or more zoning districts in an eligible location, within which a developer may elect to either develop a project in accordance with requirements of the smart growth zoning district ordinance or by-law, or develop a project in accordance with requirements of the underlying zoning district.

"Smart growth zoning district certificate of compliance", a written certification by the department in accordance with sec. 7.

"Trust fund", the smart growth housing trust fund established by section 35BB of chapter 10.

Section 3. In its zoning ordinance or by-law, a city or town may adopt a smart growth zoning district in an eligible location and may include adjacent areas that are served by existing infrastructure and utilities, and that have pedestrian access to at least 1 destination of frequent use, such as schools, civic facilities, places of commercial or business use, places of employment, recreation or transit stations. A smart growth zoning district ordinance or by-law, or any amendment to or repeal of such ordinance or by-law, shall be adopted in accordance with section 5 of chapter 40A.

In creating such a district, a city or town may include qualifying areas within development districts approved by the economic assistance coordinating council pursuant to chapter 40Q or any area approved by a city or town as an urban center housing tax-increment financing zone pursuant to section 60 of chapter 40. In smart growth zoning districts, a city or town shall zone for primary residential use as of right and may also permit business, commercial or other uses consistent with primary residential use.

Section 4. (a) Upon application by a city or town, the department shall make a preliminary determination, before the city or town votes on a proposed smart growth zoning ordinance or bylaw, whether the district would be eligible for the financial incentives and the priorities for state expenditures set forth in section 9. The department's determination shall be communicated to the city or town in a letter of eligibility. If the department denies the application, it shall inform the applicant of the deficiencies in its submission. A city or town may re-apply for approval after addressing any deficiencies in a prior application. If the department does not act upon a complete and approvable application within 60 days of receipt, the application shall be deemed approved.

(b) After issuance of a letter of eligibility and upon application of the town with proof of adoption of the smart growth zoning district ordinance or by-law included in the application for a letter of eligibility, along with any amendment required by the

department in the letter of eligibility, the department shall confirm its approval within 30 days of receipt of the application.

Section 5. The chief executive of a city or town desiring to adopt a smart growth zoning district ordinance or by-law shall submit the necessary materials to the department for a preliminary determination of eligibility for approval. The information in the application shall:

(a) identify and describe the boundaries of the proposed smart growth zoning district;

(b) identify and describe the developable land area within the proposed smart growth zoning district;

(c) identify and describe other residential development opportunities for infill housing and the residential re-use of existing buildings and under-utilized buildings within already developed areas;

(d) include a comprehensive housing plan, as set forth in section 8;

(e) include a copy of the proposed smart growth district ordinance or by-law;

(f) by narrative and exhibits, establish the elements set forth in section 6.

Section 6. (a) A proposed smart growth zoning district shall satisfy the following minimum requirements:

1. The proposed district shall be located in an eligible location;

2. The zoning for the proposed district shall provide for residential use to permit a mix of housing such as for families, individuals, persons with special needs or the elderly.

3. Housing density in the proposed district shall be at least 20 units per acre for multi-family housing on the developable land area; 8 units per acre for single-family homes on the developable land area; and 12 units per acre for 2 and 3 family buildings on the developable land area.

4. The zoning ordinance or by-law for each proposed district shall provide that not less than 20 per cent of the residential units constructed in projects of more than 12 units shall be affordable, as defined in section 2, and shall contain mechanisms to ensure that not less than 20 per cent of the total residential units constructed in each district shall be affordable.

5. A proposed district shall permit infill housing on existing vacant lots and shall allow the provision of additional housing units in existing buildings, consistent with neighborhood building and use patterns, building codes and fire and safety codes.

6. A proposed smart growth zoning district shall not be subject to limitation of the issuance of building permits for residential uses or a local moratorium on the issuance of such permits.

7. A proposed district shall not impose restrictions on age or any other occupancy restrictions on the district as a whole. This shall not preclude the development of specific projects that may be exclusively for the elderly, the disabled or for assisted living. Not less than 25 per cent of the housing units in such a project shall be affordable housing.

8. Housing in a smart growth zoning district shall comply with federal, state and local fair housing laws.

9. A proposed district may not exceed 15 per cent of the total land area in the city or town. Upon request, the department may approve a larger land area if such approval serves the goals and objectives of the chapter.

10. The aggregate land area of all approved smart growth zoning districts in the city or town may not exceed 25 per cent of the total land area in the city or town.

11. Housing density in a proposed district shall not over burden infrastructure as it exists or may be practicably upgraded in light of anticipated density and other uses to be retained in the district.

12. A proposed smart growth zoning district ordinance or by-law shall define the manner of review by the approving authority in accordance with section 11 and shall specify the procedure for such review in accordance with regulations of the department.

(b) A city or town may modify or eliminate the dimensional standards contained in the underlying zoning in the smart growth zoning district ordinance or by-law in order to support desired densities, mix of uses and physical character. The standards that are subject to modification or waiver may include, but shall not be limited to, height, setbacks, lot coverage, parking ratios and locations and roadway design standards. Modified requirements may be applied as of right throughout all or a portion of the smart growth zoning district, or on a project specific basis through the smart growth zoning district plan review process as provided in the ordinance or by-law. A city or town may designate certain areas within a smart growth zoning district as dedicated perpetual open space through the use of a conservation restriction as defined in section 31 of chapter 184 or other effective means. The amount of such open space shall not be included as developable land area within the smart growth zoning district. Open space may include an amount of land equal to up to 10 per cent of what would otherwise be the developable land area if the developable land would be less than 50 acres, and 20 per cent of what

would otherwise be the developable land area if the developable land area would be 50 acres or more.

(c) The zoning for the proposed district may provide for mixed use development.

(d) A smart growth zoning district may encompass an existing historic district or districts. A city or town, with the approval of the department, may establish a historic district in an approved smart growth zoning district in accordance with chapter 40C, so long as the establishment of the historic district meets requirements for such a historic district and does not render the city or town noncompliant with this chapter, as determined by the department. The historic districts may be coterminous or non-coterminous with the smart growth zoning district. Within any such historic district, the provisions and requirements of the historic district may apply to existing and proposed buildings.

(e) A city or town may require more affordability than required by this chapter, both in the percentage of units that must be affordable, and in the levels of income for which the affordable units must be accessible, provided, however, that affordability thresholds shall not unduly restrict opportunities for development.

(f) With respect to a city or town with a population of fewer than 10,000 persons, as determined by the most recent federal decennial census, for hardship shown, the department may, pursuant to regulations adopted under this chapter, approve zoning for a smart growth zoning district with lower densities than provided in this chapter, if the city or town satisfies the other requirements set forth in this section; provided, however, that such approval shall not be withdrawn solely because, in a future census, the population of the city or town exceeds 10,000.

(g) Any amendment or repeal of the zoning for an approved smart growth zoning district ordinance or by-law shall not be effective without the written approval by the department. Each amendment or repeal shall be submitted to the department with an evaluation of the effect on the city or town's comprehensive housing plan described in section 8. Amendments shall be approved only to the extent that the district remains in compliance with this chapter. If the department does not respond to a complete request for approval of an amendment or repeal within 60 days of receipt, the request shall be deemed approved.

(h) Nothing in this chapter shall affect a city or town's authority to amend its zoning ordinances or by-laws under chapter 40A, so long as the changes do not affect the smart growth zoning district.

Section 7. (a) On or before October 1 of each year after the year of approval of a district by the department, the department shall send a smart growth zoning district certificate of compliance to each city or town with an approved district. In order to receive such a certificate, the city or town shall verify within the time specified by the department:

1. that the city or town has adopted an approved a smart growth zoning district;
2. that the certification has not been revoked by the department;
3. that the district is being developed in a manner that reasonably complies with the minimum requirements set forth in section 6 for housing density and affordability;
4. that the approving authority has not unreasonably denied plans for projects, or has only denied plans for projects in a manner consistent with its smart growth zoning district ordinance or by-law, the city or town's comprehensive housing plan and this chapter.

(b) If the department is unable to certify compliance, the department shall hold a public hearing subject to chapter 30A. If the department concludes that the city or town is in material noncompliance with the requirements set forth in this section, the department may revoke certification. A revocation of certification shall be recorded with the registry of deeds or land court registry district for the county or district within which the city or town is located, indexed in the grantor index under the name of the city or town. Any revocation of certification or other sanctions imposed by the department shall not affect the validity of the smart growth zoning ordinance or by-law, or the application of such ordinance or by-law to land, development or proposed development within the smart growth zoning district.

Section 8. A city or town shall prepare a comprehensive housing plan to be submitted for review and approval to the department before or concurrently with the city or town's application for a letter of eligibility. The plan shall include an estimate of the projected number of units of new construction that could be built in the proposed smart growth zoning district. If a city or town has already completed a comprehensive housing plan, the city or town shall submit with its application to the department a description of how the proposed smart growth zoning district relates to and will further the goals of its comprehensive housing plan, as well as an estimate of the projected number of units of new construction that could be build within the district.

Section 9. Each city or town with an approved smart growth zoning district shall be entitled to payments as described below.

(a) Within 10 days of confirmation of approval by the department of a smart growth zoning district, the commonwealth shall pay from the trust fund a zoning incentive payment, according to the following schedule:

Projected Units of New Construction Payment

Up to 20	\$10,000
21 to 100	\$75,000

101 to 200	\$200,000
201 to 500	\$350,000
501 or more	\$600,000

The projected number of units shall be based upon the zoning adopted in the smart growth zoning district and consistent with the city or town's comprehensive housing plan.

(b) The commonwealth shall pay from the trust fund a one-time density bonus payment to each city or town with an approved smart growth zoning district. This payment shall be \$3,000 for each housing unit of new construction that is created in the smart growth zoning district. The amount due shall be paid on a unit-by-unit basis, within 10 days of submission by a city or town of proof of issuance of a building permit for a particular housing unit or units within the district.

(c) The executive office of environmental affairs, the executive office of transportation, the department of housing and community development and the secretary of administration and finance shall, when awarding discretionary funds, use a methodology of awarding such funds that favors cities or towns with approved smart growth zoning districts or other approved zoning policies or initiatives that encourage increased affordable housing production in the commonwealth including, but not limited to, inclusionary zoning.

Section 10. A city or town may adopt, in accordance with the regulations of the department, design standards applicable to projects undergoing review by the approving authority, to ensure that the physical character of development within the smart growth zoning district is complementary to adjacent buildings and structures and is consistent with the comprehensive housing plan and any applicable master plan or plans for the city or town. Such standards may address the scale and proportions of buildings, the alignment, width and grade of streets and sidewalks, the type and location of infrastructure, the location of building and garage entrances, off-street parking, the protection of significant natural site features, the location and design of on-site open spaces, exterior signs and buffering in relation to adjacent properties. The standards shall provide for high-density quality development consistent with the character of building types, streetscapes and other city or town features traditionally found in densely settled areas of the city or town or in the region of the city or town.

A design standard shall not be adopted if it will add unreasonable costs to residential or mixed-use developments. A design standard shall not unreasonably impair the economic feasibility of proposed projects. The department may disapprove a request for the determination of eligibility for a smart growth zoning district on account of a design standard adding such unreasonable costs or unreasonably impairing such feasibility.

Section 11. (a) A city or town may incorporate provisions within the smart growth district zoning ordinance or by-law that prescribe contents of an application for approval of a project. The ordinance or by-law may require the applicant to pay for reasonable consulting fees to provide peer review of the applications for the benefit of the approving authority. Such fees shall be held by the municipality in a separate account and used only for expenses associated with the review of the development application by outside consultants and any surplus remaining after the completion of such review, including any interest accrued, shall be returned to the applicant forthwith. The smart growth zoning district ordinance or by-law may provide for the referral of the plan to municipal officers, agencies or boards other than the approving authority for comment. Any such board, agency or officer shall provide any comments within 60 days of its receipt of a copy of the plan and application for approval.

(b) An application to an approving authority for approval under a smart growth zoning ordinance or by-law shall be governed by the applicable zoning provisions in effect at the time of the submission, while the plan is being processed, during the pendency of any appeal and for 3 years after approval. If an application is denied, the zoning provisions in effect at the time of the application shall continue in effect with respect to any further application filed within 2 years after the date of the denial except as the applicant may otherwise choose.

(c) An application for approval under this section shall be filed by the applicant with the city or town clerk and a copy of the application including the date of filing certified by the town clerk shall be filed forthwith with the approving authority. The approving authority shall hold a public hearing for which notice has been given as provided in section 11 of chapter 40A. The decision of the approving authority shall be made, and a written notice of the decision filed with the city or town clerk, within 120 days of the receipt of the application by the city or town clerk. The required time limits for such action may be extended by written agreement between the applicant and the approving authority, with a copy of such agreement being filed in the office of the city or town clerk. Failure of the approving authority to take action within said 120 days or extended time, if applicable, shall be deemed to be an approval of the plan. The applicant who seeks approval of a plan by reason of the failure of the approving authority to act within such time prescribed, shall notify the city or town clerk, in writing within 14 days from the expiration of said 120 days or extended time, if applicable, of such approval and that notice has been sent by the applicant to parties in interest. The applicant shall send such notice to parties in interest by mail and each such notice shall specify that appeals, if any, shall be made pursuant to this section and shall be filed within 20 days after the date the city or town clerk received such written notice from the applicant that the approving authority failed to act within the time prescribed.

(d) The approving authority shall issue to the applicant a copy of its decision containing the name and address of the owner, identifying the land affected, and the plans that were the subject of the decision, and certifying that a copy of the decision has been filed with the city or town clerk and that all plans referred to in the decision are on file with the approving authority. If 20 days have elapsed after the decision has been filed in

the office of the city or town clerk without an appeal having been filed or if such appeal, having been filed, is dismissed or denied, the city or town clerk shall so certify on a copy of the decision. If the plan is approved by reason of the failure of the approving authority to timely act, the clerk shall make such certification on a copy of the application. A copy of the decision or application bearing such certification shall be recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

(e) The project shall be approved by the approving authority subject only to those conditions that are necessary: (1) to ensure substantial compliance of the proposed project with the requirements of the smart growth zoning district ordinance or by-law; or (2) to mitigate any extraordinary adverse impacts of the project on nearby properties. An application may be denied only on the grounds that: (i) the project does not meet the conditions and requirements set forth in the smart growth zoning district ordinance or by-law; (ii) the applicant failed to submit information and fees required by the ordinance or by-law and necessary for an adequate and timely review of the design of the project or potential project impacts; or (iii) it is not possible to adequately mitigate significant adverse project impacts on nearby properties by means of suitable conditions.

(f) Any court authorized to hear appeals under section 17 of chapter 40A shall be authorized to hear an appeal from a decision under this section by a party who is aggrieved by such decision. Such appeal may be brought within 20 days after the decision has been filed in the office of the city or town clerk. Notice of the appeal, with a copy of the complaint shall be given to such city or town clerk so as to be received within such 20 days. Review shall be based on the record of information and plans presented to the approving authority. To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within 14 days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the approving authority, and shall within 21 days after the entry of the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time, the complaint shall be dismissed.

(g) A complaint by a plaintiff challenging the approval of a project under this section shall allege the specific reasons why the project fails to satisfy the requirements of this chapter or other applicable law and allege specific facts establishing how the plaintiff is aggrieved by such decision. The approving authority's decision in such a case shall be affirmed unless the court concludes the approving authority abused its discretion under subsection (e) in approving the project. The applicant and all members of the approving authority shall be named as defendant parties.

(h) A plaintiff seeking to reverse approval of a project under this section shall post a bond in an amount to be set by the court that is sufficient to cover twice the estimated:

(i) annual carrying costs of the property owner, or a person or entity carrying such costs

on behalf of the owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover the defendant's attorneys fees, all of which shall be computed over the estimated period of time during which the appeal is expected to delay the start of construction. The bond shall be forfeited to the property owner in an amount sufficient to cover the property owner's carrying costs and legal fees less any net income received by the plaintiff from the property during the pendency of the court case in the event a plaintiff does not substantially prevail on its appeal.

(i) An applicant for plan approval who appeals from a project denial or conditional approval shall identify in its complaint the specific reasons why the approving authority's decision fails to satisfy requirements of this chapter or other applicable law. The approving authority shall have the burden of justifying its decision by substantial evidence in the record.

(j) The land court department, the superior court department and the housing court department shall have jurisdiction over an appeal under this section and shall give priority to such an appeal.

(k) The first paragraph of section 16 of chapter 40A shall not apply to applications for projects within a smart growth zoning district.

(l) A project approval shall remain valid and shall run with the land indefinitely provided that construction has commenced within 2 years after the decision is issued, which time shall be extended by the time required to adjudicate any appeal from such approval and which time shall also be extended if the project proponent is actively pursuing other required permits for the project or there is other good cause for the failure to commence construction, or as may be provided in an approval for a multi-phase project.

Section 12. The department shall be responsible for the administration, review, and reporting on the smart growth zoning district program as provided in this chapter. The department shall undertake or cause to be undertaken an annual review and the preparation of a report on the program set forth in this chapter and may require data to be provided by cities and towns with smart growth zoning districts. The report shall be prepared on the basis of such data and shall be made available to the general public and submitted to the general court annually not later than November 15 of each year, and shall cover the status of the program through the end of the prior fiscal year. The report shall identify and describe the status of cities and towns that are actively seeking letters of eligibility. It shall identify approved smart growth zoning districts and the amounts and anticipated timing of one-time density bonus payments during the prior and current fiscal year. It shall summarize the amount of land areas zoned for particular types of projects in both proposed and approved districts, the number of projects being reviewed by cities and towns under section 11, including the number and type of proposed residential units, the number of building permits issued, the number of completed housing units and their type, and it shall set out the one-time density bonus payments made to each city or town. For the then current and the immediately succeeding fiscal years it

shall make estimates for the: (i) number and size of proposed new districts; (ii) the potential number of residential units to be allowed in new districts; and (iii) anticipated construction activity.

Section 13. A city or town may apply to the department for approval of an existing zoning district as a smart growth zoning district if it meets the requirements for such a district, including the affordability requirements and the density requirements. The application shall be the same as for a new smart growth zoning district. Upon approval, a city or town with an existing district shall become entitled to the one-time density bonus payments upon the construction of new units within the smart growth zoning district and preference of capital expenditure funds, as provided in section 9, from the date of approval, but shall not be eligible for zoning incentive payments.

Section 14. The department shall require the cities and towns, if within 3 years no construction has been started within the smart growth zoning district, to repay to the department all monies paid to the city or town under this chapter for said smart growth zone. The 3 years shall commence on the date of the payment of the zoning incentive payment for said smart growth zoning district. All monies returned to the department under this section shall be returned to the trust fund.